

SANFORD L. MICHELMAN, ESQ. (SBN 179702)  
smichelman@mrlp.com

ROBERT D. ESTRIN, ESQ. (SBN 260402)  
restrin@mrlp.com

**MICHELMAN & ROBINSON, LLP**  
10880 Wilshire Blvd., 19th Floor  
Los Angeles, CA 90024  
Telephone: (310) 564-2670  
Facsimile: (310) 564-2671

TODD H. STITT, ESQ. (SBN 179694)  
tstitt@mrlp.com

**MICHELMAN & ROBINSON, LLP**  
17901 Von Karman Avenue, 10th Floor  
Irvine, California 92614  
Telephone: (714) 557-7990  
Facsimile: (714) 557-7991

Attorneys for Plaintiff  
WESTERN AIR CHARTER, INC. dba JET EDGE

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

WESTERN AIR CHARTER, INC.,  
doing business as JET EDGE  
INTERNATIONAL, a California  
corporation,

Plaintiff,

v.

PAUL SCHEMBARI, an individual;  
ACP JET CHARTERS, INC., doing  
business as PHENIX JET, a Florida  
corporation; PHENIX JET LLC, a  
Guam Limited Liability Company,  
COSA DI FAMIGLIA HOLDINGS,  
LLC, a Guam Limited Liability  
Company, and DOES 1-10, inclusive,

Defendants.

Case No.: 2:17-cv-00420-JGB (KSx)  
Honorable Jesus G. Bernal

**PLAINTIFF'S NOTICE OF MOTION  
AND MOTION FOR PARTIAL  
SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

[Filed concurrently with Separate  
Statement of Undisputed Facts; Six  
Supporting Declarations; and Application  
to File Under Seal]

**Trial Date: January 15, 2019**

Date: September 10, 2018  
Time: 9:00 a.m.  
Dept: Courtroom 1  
Judge: Hon. Jesus G. Bernal

**NOTICE OF MOTION**

Notice is hereby given that on September 10, 2018, at 9:00 a.m., or as soon thereafter as this matter may be heard, before the Honorable Jesus G. Bernal, in Courtroom 1 of the United States District Court for the Central District of California, at 3470 Twelfth Street, Riverside, CA 92501, Plaintiff Western Air Charter, Inc., doing business as Jet Edge International, (“Jet Edge” or “Plaintiff”) will move the Court seeking the entry of summary judgment as to certain claims in this action pursuant to Federal Rules of Civil Procedure Rule 56.

The Court should grant summary judgment as to Plaintiff’s first claim against Defendant and Cross-Complainant Paul Schembari (“Schembari”) for breach of contract. The undisputed facts show that Schembari breached several provisions of his employment contract, including:

- Section 3: “Exclusivity”;
- Section 6.2: “Restrictions” on Confidential Information;
- Section 6.4: “Return of Property and Confidential Information.”;
- Section 7.3: “Non-disparagement”; and
- Section 7.4: “Prohibition on Planning.”

Schembari’s breaches of these provisions of his employment contract with Schembari has caused Plaintiff harm in the form of losing several customers to Schembari’s competing business, as well as Jet Edge having to pay his salary during a time when Schembari was not working exclusively for Jet Edge.

In the alternative, Plaintiff moves for partial summary judgment that Schembari has established the first three elements of breach of contract for each of the following provisions:

- Section 3: “Exclusivity”;
- Section 6.2: “Restrictions” on Confidential Information;
- Section 6.4: “Return of Property and Confidential Information.”;
- Section 7.3: “Non-disparagement”; and
- Section 7.4: “Prohibition on Planning.”

1 In addition to the foregoing, the Court should dismiss Schembari's first  
 2 counterclaim for unfair competition under Cal. Bus. & Prof. Code Section 17200 as  
 3 a matter of law. The undisputed facts show that this counterclaim fails as a matter  
 4 of law for at least the following reasons:

- 5 • Schembari lacks standing to sue;
- 6 • Schembari's counterclaim is barred by the *Noerr-Pennington* Doctrine  
 7 and the California Litigation Privilege;
- 8 • Schembari has improperly changed his theory of damages after the  
 9 close of discovery and cannot recover damages based on the allegation  
 10 in his Second Amended Counterclaim or his new theory of damages;
- 11 • Jet Edge did not cause Schembari harm; and
- 12 • Edge did not act unlawfully, unfairly, or fraudulently as required under  
 13 Cal. Bus. & Prof. Code Section 17200.

14 Additionally, the Court should enter summary judgment dismissing  
 15 Schembari's second and third counterclaims for intentional interference with  
 16 prospective economic advantage and negligent interference with prospective  
 17 economic advantage. The undisputed facts show that these counterclaims fail as a  
 18 matter of law for at least the following reasons:

- 19 • Schembari lacks standing to sue;
- 20 • Schembari's counterclaims are barred by the *Noerr-Pennington*  
 21 Doctrine and the California Litigation Privilege;
- 22 • Schembari has improperly changed his theory of damages after the  
 23 close of discovery and cannot recover damages based on the allegation  
 24 in his Second Amended Counterclaim or his new theory of damages;
- 25 • Jet Edge did not have knowledge of Schembari's claimed  
 26 relationships;
- 27 • Jet Edge did not cause Schembari harm; and
- 28 • Jet Edge did not commit an independently wrongful act

1 This motion is based upon this Notice of Motion, the following Memorandum  
2 of Points and Authorities, the filings and record in this case, arguments of counsel,  
3 and such other evidence as may be allowed at the hearing on this motion.

4 This motion is made following the conference of counsel pursuant to L.R. 7-  
5 3 which took place on July 25, 2018.

6  
7 Dated: August 6, 2018

**MICHELMAN & ROBINSON, LLP**

8  
9 By: /s/ Robert Estrin

10 Sanford L. Michelman

11 Todd Stitt

12 Robert Estrin

13 *Attorneys for*

14 *WESTERN AIR CHARTER, INC.*

15 *dba JET EDGE INTERNATIONAL*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

**A. Plaintiff Jet Edge's Complaint**

Defendant and Counterclaimant Paul Schembari ("Schembari") used his position at Jet Edge to secretly create his own competing jet management company ("Phenix Jet")<sup>1</sup> with the help of a Japanese conglomerate Sojitz Corporation ("Sojitz"). While Jet Edge thought it was entering into a joint venture with Sojitz, in reality Sojitz was working with Schembari to syphon Jet Edge's customers and confidential information for the benefit of Phenix Jet. Before Jet Edge knew of Schembari's and Sojitz's plan, five private aircraft that had entered into contracts with Jet Edge cancelled their contracts and left for Phenix Jet.

To accomplish this heist, Schembari disregarded and breached his employment agreement with Jet Edge. Jet Edge wanted to ensure that its employees were not working on businesses designed to compete with Jet Edge while still employed by Jet Edge, so it included two clauses in its employment contracts to prevent employees from competing, or planning to compete, with Jet Edge during an employee's employment. Schembari not only prepared to compete with Jet Edge while still employed by Jet Edge, but he actually did compete with Jet Edge. As a result of Schembari's improper competition while still employed by Jet Edge, Schembari arranged to steal five Jet Edge clients before resigning from Jet Edge.

Perhaps most disturbing is Schembari's blatant breach of Section 7.3 of his employment agreement which prevented Schembari from disparaging Jet Edge to Jet Edge's clients, potential clients, or business partners. Schembari made multiple disparaging remarks regarding Jet Edge to Jet Edge clients. For example, Schembari told a Jet Edge client that "[f]lights dispatched by JEI [Jet Edge] never go smoothly as there are always mistakes, oversights, and lack of communication."

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<sup>1</sup> Schembari named his competing entity Phenix Jet. Defendants ACP Jet Charters dba Phenix Jet and Phenix Jet LLC will hereinafter be referred to as "Phenix Jet."

1 In addition to these breaches, Schembari also breached his contract by using  
 2 Jet Edge's confidential information to create nearly identical documents for Phenix  
 3 Jet. For example, Schembari took Jet Edge's confidential Initial Operation  
 4 Experience Completion documents, which relate to Jet Edge's training of pilots,  
 5 and removed the Jet Edge logo and placed Phenix Jet's name on the documents.

6 Schembari will claim that his employment contract with Jet Edge is invalid.  
 7 Schembari never made this claim while collecting his \$220,000 salary plus benefits.  
 8 Moreover, Schembari actually copied his Jet Edge employment contract to create  
 9 his own employment contract with Phenix Jet unconcerned with any of the clauses.

#### 10 **B. Schembari's Counterclaim**

11 In response to Jet Edge's complaint, Schembari filed three meritless  
 12 counterclaims for unfair competition and intentional and negligent interference with  
 13 prospective economic advantage. Schembari clearly had no basis for filing these  
 14 counterclaims when he did in 2017. As discussed herein, there are multiple reasons  
 15 why the Court should grant summary judgment as to Schembari's Counterclaim.

16 First, the damages claimed belong to Phenix Jet Hong Kong ("PJHK"), not  
 17 Schembari. Schembari does not have standing to bring a claim for damages on  
 18 behalf of PJHK. Second, the damages claimed by PJHK clearly stem from Jet Edge  
 19 bringing this lawsuit, which is a protected activity under the *Noerr-Pennington*  
 20 doctrine and the California Litigation privilege. Third, Schembari abandoned his  
 21 initial theory of damages contained in his Second Amended Counterclaim  
 22 ("SACC") and discovery responses in exchange for a new theory first advanced in  
 23 his damages expert's report. Since Schembari failed to supplement his discovery  
 24 responses to include this new theory of damages he is estopped from relying on his  
 25 new theory of damages at this stage of the litigation.

26 Fourth, the undisputed facts show Schembari cannot establish the elements  
 27 for his intentional and negligent interference claims. As set forth in three separate  
 28 declarations, the undisputed facts show that Jet Edge had no idea that PJHK even

1 existed, let alone had potential relationships with the claimed entities. Furthermore,  
 2 the undisputed facts show that Jet Edge did not engage in any independent wrongful  
 3 act and that Schembari did not suffer damages based on any action by Jet Edge.

4 Based on the foregoing, the Court should grant summary judgment as to Jet  
 5 Edge's breach of contract claim and dismiss Schembari's three counterclaims.

## 6 **II. FACTUAL BACKGROUND**

### 7 **A. Undisputed Facts Relating To Schembari's Breaches Of His** 8 **Contract With Jet Edge**

#### 9 **i. Jet Edge Enters Into Contracts With Five Jet Owners.**

10 Jet Edge provides charter, maintenance, and management services for private  
 11 aircraft, including providing pilots and crew to fly the jets it has under management.  
 12 In 2013 and 2014, Jet Edge entered into Aircraft Charter Management Agreements  
 13 ("ACMAS") to manage jets for five different owners. (Statement of Undisputed  
 14 Facts ("SUF") No. 81.)

#### 15 **ii. Jet Edge and Paul Schembari Enter Into an Employment** 16 **Agreement.**

17 On or about February 14, 2014, Schembari entered into an employment  
 18 agreement with Jet Edge to act as lead pilot in command of an aircraft belonging to  
 19 one of the Jet Edge Customers. (SUF No. 1.) Schembari's employment contract  
 20 contained several provisions that Schembari breached during his time at Jet Edge  
 21 and after he left. These provisions include: (1) Section 3: "Exclusivity"; (2) Section  
 22 6.2: "Restrictions" on Confidential Information; (3) Section 6.4: "Return of  
 23 Property and Confidential Information"; (4) Section 7.3: "Non-disparagement"; and  
 24 (5) Section 7.4: "Prohibition on Planning." (SUF No. 1.)

25 //

26 //

27 //

28 //

1                   **iii.       Schembari Disparages Jet Edge To Its Clients, Laying the**  
 2                   **Groundwork for Defendants To Steal the Jet Edge**  
 3                   **Customers.**

4           Schembari never had Jet Edge’s best interests at heart. Within a year of  
 5 beginning his employment with Jet Edge, Schembari informed Sojitz and one of the  
 6 Jet Edge Customers (who Schembari eventually stole), that “working with JEI [Jet  
 7 Edge] ops *is continually challenging* due to time zone differences and their  
 8 workload with US domestic fleet. If this is the case you will become *frustrated* in  
 9 only a short time.” (SUF No. 71.) The next day, Schembari told Sojitz and the  
 10 same Jet Edge customer that “[f]lights dispatched by JEI [Jet Edge] never go  
 11 *smoothly* as there are always mistakes, oversights, and lack of communication.”  
 12 (SUF No. 72.) Schembari concluded by saying “[p]lease keep my comments  
 13 between us, as I don’t want David to feel like I am undermining him.” (Id.)  
 14 Importantly, Schembari sent these disparaging e-mails from his personal e-mail  
 15 account. (SUF Nos. 71-72.)

16                   **iv.       Schembari and Defendants Actively Compete with Jet Edge**  
 17                   **and Interfere with Jet Edge’s Client Relationships During**  
 18                   **Schembari’s Employment with Jet Edge.**

19           Schembari testified he had a meeting with Sojitz representatives in November  
 20 2015, during which time he opted to work with Sojitz to create a new aviation  
 21 management company. (SUF No. 10.) Further, Schembari never informed Jet  
 22 Edge that he was going to work on a competing company with Sojitz. In fact, by  
 23 the end of November 2015, Schembari had already named his competing business  
 24 that would eventually steal the Jet Edge Customers Phenix Jet. (SUF No. 12.)

25           Schembari accelerated his efforts to steal the Jet Edge Customers at the end  
 26 of 2015 and beginning of 2016. On or about December 3, 2015, Schembari met  
 27 with Rodney Webb to discuss concrete plans on how to run Schembari’s competing  
 28 business. (SUF No. 21.) Over the next few months, Schembari and Rodney Webb

1 developed a detailed business plan to compete against Jet Edge. (SUF No. 26.) On  
2 February 18, 2016, Rodney Webb e-mailed this business plan to Schembari. (Id.)  
3 The business plan's "financial plan" section shows that it would receive  
4 management revenue and charter sales revenue from the *same airplanes* (as seen  
5 by the tail numbers) currently under management by Jet Edge. (SUF Nos. 26-27.)  
6 Also attached to Rodney Webb's February 18, 2016 e-mail were detailed financial  
7 projections about these same airplanes currently under Jet Edge management. (SUF  
8 No. 25 & 28.) Schembari also testified that a document, which was incorporated  
9 into the business plan, named as customers jets managed by Jet Edge. (SUF No.  
10 29.) Clearly, while Schembari was still employed by Jet Edge, he had a deal in  
11 place with the Sojitz to steal the Jet Edge Customers. Indeed, the mere existence,  
12 and success, of Schembari's new business relied entirely on the airplanes under Jet  
13 Edge management.

14 Phenix Jet was set up to compete with Jet Edge. Indeed, the business plan  
15 discussed above labelled Jet Edge as a key competitor of Phenix Jet in the Asian  
16 region. (SUF No. 22.) Furthermore, Schembari admitted at his deposition that  
17 Phenix Jet was "either a similar operator or a regional competitor to Phenix Jet."  
18 (SUF No. 18.) Phenix Jet's Chief Operating Officer, Elsie Quenga, also testified  
19 that she considered Phenix Jet and Jet Edge to be competitors in the charter  
20 business. (SUF No. 19.)

21 Additional evidence reveals the depth of Schembari's interference with Jet  
22 Edge customers. On January 18, 2016, Rodney Webb e-mailed Schembari with  
23 notes from a January 13, 2016 meeting. (SUF No. 15.) These notes show that  
24 Schembari had confirmation that the Jet Edge Customers would leave Jet Edge for  
25 his new company Phenix Jet. Bullet point six of the notes states: "Phenix will enter  
26 into a business relationship with the Sojitz company based in Japan. The new  
27 business will manage 6 jets on behalf of Sojitz. The 6 planes under management  
28 will be housed in hangars in Japan (but only four aircraft will be available for

1 charter)." (Id.) At her deposition, Elsie Quenga confirmed that those six jets were  
 2 *"under Jet Edge Management . . . at the time."* (Id.)

3 To ensure that Schembari could steal the Jet Edge Customers, he previously  
 4 assured the Jet Edge Customers that they could separate from Jet Edge without a  
 5 problem, telling one such owner that "authorizations belong to the aircraft owner  
 6 and would allow Pocket Corp. to operate the aircraft in the event of a separation  
 7 from JEI [Jet Edge] without any disruption." (SUF No. 73.)

8 **v. Schembari Knew His Actions Were Improper and Timed**  
 9 **His Departure on the Status of the Jet Edge Customers**  
 10 **Leaving Jet Edge.**

11 When Yohei Sakurai, a representative of Sojitz, asked if Schembari could  
 12 sign a broker agreement that compensated Schembari for helping steal the Jet Edge  
 13 Customers, Schembari stated: "Yes, I can sign as I don't believe the details of this  
 14 agreement will become known to anyone outside of our circle." (SUF No. 31.)  
 15 Schembari signed this broker agreement while employed by Jet Edge, wherein a  
 16 Sojitz subsidiary eventually paid Schembari's wholly owned company Cosa di  
 17 Famiglia Holdings LLC ("CDF") approximately \$300,000 to broker a deal that  
 18 allowed the Jet Edge Customers to leave Jet Edge for Phenix Jet. (SUF No. 39.)

19 Consistent with his approach to ensure the Jet Edge Customers would leave  
 20 Jet Edge, Schembari asked Sakurai on February 29, 2016 about the status of moving  
 21 the Jet Edge Customers from Jet Edge to Schembari's new company so that he knew  
 22 when to resign from Jet Edge. (SUF Nos. 42-43.) In particular, there was a new  
 23 Sojitz jet, tail number N2020Q, that needed management services, which Schembari  
 24 and Sakurai diverted away from Jet Edge and eventually to Schembari's new  
 25 company. (SUF No. 41.) Schembari testified at deposition that he "did not decide  
 26 to resign [from Jet Edge] until I was assured that the aircraft management agreement  
 27 for that particular aircraft [N2020] would be signed." (SUF No. 43.) Thus,  
 28 Schembari actively competed with Jet Edge by stealing the Jet Edge Customers

1 from Jet Edge and placing them with his new company all while employed by Jet  
2 Edge. Further, Schembari actively competed with Jet Edge by preventing additional  
3 jets, like N2020Q, from signing management agreements with Jet Edge.

4 **vi. Schembari, While Still Employed by Jet Edge, Along with**  
5 **Defendants and Sojitz, Took the Additional Step To Get the**  
6 **Necessary Certification To Allow the Jet Edge Customers**  
7 **To Move from Jet Edge to Phenix Jet.**

8 A major step Schembari took to ensure he could steal the Jet Edge Customers  
9 also occurred while still employed by Jet Edge. Specifically, to manage and fly  
10 jets, a jet management company requires a 14 CFR Part 135 Air Carrier and  
11 Operator Certificate on which to register its jets. Schembari explored various  
12 options for obtaining this certificate, ultimately deciding to purchase ACP Jet  
13 Charters, Inc.'s certificate ("ACP"). (SUF Nos. 33-39.) On March 10, 2016,  
14 Schembari told Bob Seidel, the president of the company that owned the certificate,  
15 that "[o]ur aircraft are currently under management at another aircraft management  
16 company and require 90 days notification for termination of the management  
17 contracts." (SUF No. 37.) Mr. Seidel's response shows that both he and Schembari  
18 knew that these jets, which would switch to the ACP's certificate, were the Jet Edge  
19 Customers. (Id.) Mr. Seidel testified that in his discussions with Schembari, he  
20 told Mr. Seidel he had four aircraft that he was going to bring to his new company.  
21 (SUF No. 40.) Mr. Seidel testified that he later learned these aircraft Schembari  
22 referred to in early March 2018 were managed by Jet Edge. (Id.)

23 **vii. Schembari Takes Jet Edge Confidential Information and**  
24 **Trade Secrets To His New Company.**

25 Schembari did not just take the Jet Edge Customers with him, he also took  
26 Jet Edge's confidential information and trade secrets. Noticeably, many of Phenix  
27 Jet's documents contain identical language as Jet Edge's documents. (e.g., SUF  
28 Nos. 50 & 56). The fact Schembari used Jet Edge's Employee Handbook to develop



1 Phenix Jet's is undeniable and admitted to. Of note, Schembari even forgot to  
 2 remove Jet Edge's name from the Phenix Jet handbook under the Employee  
 3 Property section on page 45 which states "possession of Jet Edge property . . . ."  
 4 (SUF No. 51.) The similarities between Schembari's Jet Edge employment contract  
 5 and his Phenix Jet employment contracts are also unmistakable. (SUF. Nos. 50 &  
 6 54.) Also, the ACMAs that Phenix Jet entered into with the Jet Edge Customers  
 7 mirror the ACMAs that Jet Edge previously entered into with these customers.  
 8 (SUF Nos. 59 & 61.) In fact, on May 24, 2016, Elsie Quenga told Yohei Sakurai  
 9 that the Phenix Jet "AMA mirrors Jet Edge." (SUF No. 61.) Schembari also  
 10 admitted "Phenix Jet used Jet Edge's AMA as a form document." (SUF No. 59.)

11 Schembari went out of his way to ask Jet Edge employee Mattias Rosen to  
 12 send him Jet Edge information for Schembari to use at his new company. Mattias  
 13 Rosen sent Schembari documents related to Jet Edge's Initial Operation Experience  
 14 Completion, which relate to Jet Edge's training of pilots. (SUF No. 64.) Schembari  
 15 then rebranded these materials under the Phenix Jet name, showing that he had no  
 16 problem copying Jet Edge confidential material to save Phenix Jet money in  
 17 generating its own documents. (SUF No. 66.)

18 **viii. Schembari Resigns from Jet Edge, and the Jet Edge**  
 19 **Customers Follow Him To Phenix Jet.**

20 Once Sojitz assured Schembari that the Jet Edge Customers would leave Jet  
 21 Edge and become customers of Phenix Jet, Schembari felt comfortable to officially  
 22 resign from Jet Edge on March 14, 2016. (SUF No. 8.) The inevitable followed.  
 23 One by one, the Jet Edge Customers sent cancellation letters to Jet Edge and, after  
 24 the 90-day notice of termination period, moved their business to Phenix Jet. (SUF  
 25 Nos. 82, 84, 86, 88, & 90.) This started with Pocket Corporation which sent its  
 26 termination letter to Jet Edge on March 23, 2016 and entered into a contract with  
 27 Phenix Jet on June 20, 2016. (SUF Nos. 82-83.) The rest of the Jet Edge Customers  
 28



soon followed and left Jet Edge for Schembari's competing company. (SUF Nos. 83, 85, 87, 89, & 91).

**B. Undisputed Facts and Procedural Posture Related to Schembari's SACC.**

**i. Schembari's SACC Alleges Disruption of Schembari's Relationship with the Jet Edge Customers.**

On October 20, 2017, Schembari filed his SACC against Jet Edge. Schembari based his SACC on the allegation that the non-compete provision included in his employment agreement with Jet Edge violated Cal. Bus. & Prof. Code Section 16600. (SUF No. 106.) Schembari alleged in the SACC that this non-compete provision disrupted his economic relationships with SAM Cayman, Fast Retailing, Sega Sammy Holdings, Pocket Corporation (i.e., the Jet Edge Customers) and Sojitz. (SUF No. 107.) As stated below, Schembari changed the actual relationships which he claims Jet Edge interfered with, as well as the nature of the interference.

**ii. Schembari's Discovery Responses and SACC Base His Causes of Action on the Non-Compete Clause in Schembari's Contract.**

Throughout written discovery, Schembari only identified the non-compete provision in his contract as the cause of his damages. (SUF Nos. 108, 111, & 112.) Furthermore, Schembari never mentioned any relationships that were disrupted other than with Sojitz and the Jet Edge Customers. (SUF No. 107.)

**iii. Schembari Changes His Damages Theory.**

Schembari recognized that he could not base damages on losing the relationships with the Jet Edge Customers because he actually took these relationships from Jet Edge and maintained them. Thus, in his damages expert's report, Schembari abandoned his previous theory of damages and adopted a new theory not disclosed in his SACC or written discovery. First, his damages expert's

report is clear that the “wrongful” action Schembari believes caused him damage was not a non-compete provision but the fact Jet Edge sued Schembari. (SUF Nos. 104-105.) For example, Schembari’s damages expert claims that Schembari’s damages are based on a three-year delay and one-year cooling off period in the launch of operations of the ‘AOC Charter Services’ of Phenix Jet Hong Kong. (SUF Nos. 101 & 104.)

Even more troubling is that Schembari’s damages expert’s report was the first time Jet Edge learned that Schembari was not suing based on an interference with the relationships Schembari claimed to have with Sojitz and the Jet Edge Customers. (SUF No. 134.) Instead, Schembari’s claimed damages were based on his status as a shareholder of PJHK, and the alleged interference of claimed relationships between Andrew Svoboda and Sino Jet, Metro Jet, HK Bellawings, and Hongkong Jet. (SUF No. 135-136.) Importantly, these relationships were not Schembari’s relationships. (SUF No. 103.) Between filing his SACC and his damages expert’s report, Schembari completely changed his damages theory.

**iv. Jet Edge Never Knew PJHK Existed, Let Alone That PJHK Had the Prospective Clients Claimed by Schembari.**

Schembari’s damages expert’s report, for the first time, informed Jet Edge that his damages were based on PJHK, a small jet charter business that has yet to launch. (SUF No. 115.) Unsurprisingly, Jet Edge had never heard of PJHK before June 2018. (SUF Nos. 119-121.) Naturally, Jet Edge also did not know that PJHK or Mr. Svoboda had any potential economic relationships with Sino Jet, Metro Jet, HK Bellawings, or Hongkong Jet. (SUF Nos. 122-127.) Finally, it is undisputed that Jet Edge never made any statements to these entities regarding Schembari or Phenix Jet. (SUF Nos. 128-133.)

**III. LEGAL STANDARD FOR SUMMARY JUDGMENT**

Pursuant to FRCP Rule 56(a), a party may move for summary judgment on all or part of a claim or defense. “If the moving party has sustained its burden, the

1 non-moving party must then identify specific facts, drawn from materials on file,  
 2 that demonstrate that there is a dispute as to material facts on the elements that the  
 3 moving party has contested.” *Greenwich Ins. Co. v. Media Breakaway, LLC*, 2009  
 4 WL 2231678 at \*4 (C.D. Cal. July 22, 2009). The non-moving must do more than  
 5 make “conclusory allegations [in] an affidavit.” *Lujan v. National Wildlife Fed’n*,  
 6 497 U.S. 871, 888 (1990).

7 **IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT THAT**  
 8 **SCHEMBARI BREACHED SEVERAL TERMS OF HIS**  
 9 **CONTRACT WITH JET EDGE<sup>2</sup>.**

10 “Under California law, to establish a prima facie case for a breach of contract,  
 11 a plaintiff must show (1) a contract, (2) plaintiff’s performance or excuse for  
 12 nonperformance, (3) defendant’s breach, and (4) damage to plaintiff.” *Bd. of*  
 13 *Trustees of Laborers Health & Welfare Tr. Fund for N. California v. CEM Builders,*  
 14 *Inc.*, 2018 WL 1071171 at \*5 (N.D. Cal. Feb. 27, 2018).

15 Schembari breached several provisions of his contract with Jet Edge,  
 16 including Sections 3, 6.2, 6.4, 7.3, and 7.4. These breaches are discussed below.

17 **A. Schembari and Jet Edge Entered into a Valid Employment**  
 18 **Contract.**

19 On February 14, 2014, Schembari signed an employment contract with Jet  
 20 Edge to act as the lead pilot on N650PH, beginning on March 3, 2014. (SUF No.  
 21 1.) David Erich signed this contract on behalf of Jet Edge on February 25, 2014.  
 22 The contract includes consideration from both sides, services provided by  
 23 Schembari and payment to Schembari by Jet Edge. (SUF Nos. 2, 3, & 5.) Thus, a  
 24 valid contract between Schembari and Jet Edge existed. Of note, Schembari used a  
 25 nearly identical employment contract to the one he signed at Jet Edge.

26  
 27  
 28 <sup>2</sup> Alternatively, in the event there is a disputed fact as to whether Plaintiff suffered damages  
 (which there is not), Plaintiff’s seek partial summary judgment on the first three elements of breach  
 of contract as to Sections 3, 6.2, 6.4, 7.4, and 7.4 of Schembari’s employment agreement.

1 Despite using the Jet Edge employment agreement he took from Jet Edge to  
 2 develop the Phenix Jet employee agreements, Schembari will argue that certain  
 3 sections of his employment contract are invalid as an improper restraint of trade.  
 4 Jet Edge vehemently disagrees. However, even if the Court agrees with Schembari  
 5 regarding the validity of a section of the contract, the contract as a whole is still  
 6 valid and enforceable. First, the contract contains a “Severability Provisions” at  
 7 Section 12.1 Furthermore, well established caselaw holds that noncompete  
 8 provisions are severable and do not render an agreement invalid. In *Zajicek v. Kool*  
 9 *Vent Metal Awning Corp. of America*, 283 F.2d 127, 133 (9th Cir. 1960), the Ninth  
 10 Circuit reasoned that “[i]f the portion of the contract restraining trade can be  
 11 severed, it is the apparent policy of the California courts to rule that it shall be, and  
 12 the part not so tainted enforced.”

13 In *Fields v. QSP, Inc.*, 2012 WL 2049528 at \*10 (C.D. Cal. June 4, 2012),  
 14 the court concluded that the existence of an illegal restraint of trade clause does not  
 15 mean an employment contract is “permeated with illegality.” The court relied on  
 16 the fact that “the offending provisions are contained in separate subsections within  
 17 the contract” in determining that the remainder of the contract was enforceable.  
 18 *Ibid.* Just as in *Fields*, any invalid clause in Schembari’s contract (which there is  
 19 none) is quarantined to its own separate clause, and thus does not invalidate the rest  
 20 of the contract.

## 21 **B. Jet Edge Performed Its Contractual Obligations.**

22 Jet Edge’s obligations under the employment agreement with Schembari  
 23 were contained in Sections 4 and 5 titled “Compensation” and “Employee  
 24 Benefits.” (SUF Nos. 3 & 5.) Jet Edge performed its obligation to pay Schembari  
 25 at the rate of \$220,000 during his employment pursuant to Section 4.1. (SUF No.  
 26 4.) Jet Edge provided Schembari with the benefits pursuant to Section 5. (SUF No.  
 27 6.) Thus, Jet Edge performed its obligations under the employment contract.  
 28

1           **C.     Schembari Breached Several Provisions of His Employment**  
 2           **Contract.**

3           Unlike Jet Edge, Schembari failed to live up to his obligations under his  
 4 employment agreement with Jet Edge. Schembari's many breaches of the  
 5 agreement are set forth below.

6           **i.       Schembari Breached Section 3: "Exclusivity."**

7           Section 3 of Schembari's contract states:

8           "[w]ithout the prior authorization of the Company, Employee shall not,  
 9 directly or indirectly, during the term of this Agreement: (a) render  
 10 services to any other person or entity for compensation, or (b) engage  
 11 in any activity competitive with or adverse to the Company's business,  
 whether alone, as a partner, or as an officer, director, employee,  
 consultant of investor." (SUF No. 7.)

12           As to the foregoing, Schembari admitted at deposition he did not work  
 13 exclusively for Jet Edge. Indeed, Schembari breached both part (a) and part (b) of  
 14 Section 3. In regards to part (a), Schembari breached this provision by entering into  
 15 a broker agreement on behalf of his wholly owned company CDF wherein he  
 16 provided services for Sojitz subsidiary TSI including to "[id]entify AOC holding  
 17 companies, research the suitability of the AOC being held by identified companies,  
 18 contact authorized representatives of AOC holdings companies . . . ." (SUF No.  
 19 32.) In return, TSI paid CDF \$300,000. (SUF No. 39.) Schembari entered into this  
 20 agreement on February 15, 2016 -- a month before he resigned from Jet Edge. (SUF  
 21 No. 30.) Schembari knew he was breaching his contract as he stated: "Yes, I can  
 22 sign as I don't believe the details of this agreement will become *known to anyone*  
 23 *outside of our circle.*" (SUF No. 31.)

24           Schembari performed the services set forth under Section 4.1 of the broker  
 25 agreement, as he engaged in serious discussions with Bob Seidel about purchasing  
 26 an AOC in February 2016. (SUF Nos. 35-38.) Negotiations progressed to the point  
 27 where the parties signed an NDA on February 23, 2016. (SUF No. 35.) Schembari  
 28 signed a letter of intent to purchase the AOC on March 15, the day after he resigned

1 from Jet Edge. (SUF No. 38.) Thus, Schembari provided services to TSI for  
2 compensation while still employed by Jet Edge in violation of Section 3(a).

3 As discussed in detail above, Schembari engaged in activity competitive with  
4 and adverse to Jet Edge while employed by Jet Edge in violation of Section 3(b).  
5 Schembari developed a company to steal the Jet Edge Customers. The actions  
6 Schembari took in competition with Jet Edge while still employed by Jet Edge  
7 included, but were not limited to:

- 8 • A December 3, 2015 meeting with Rodney Webb to create a business plan  
9 for Schembari's new competing venture. (SUF No. 21.)
- 10 • The creation of a detailed business plan for Phenix Jet in February of 2018.  
11 (SUF No. 26.)
- 12 • The business plan's financial projections show that Phenix Jet's projected  
13 revenue was based on the *same airplanes* (as seen by the tail numbers)  
14 currently under Jet Edge management showing that Schembari already had  
15 a deal in place to steal these jets from Jet Edge. (SUF Nos. 26-27.)
- 16 • Schembari testified that a document, which was incorporated into the  
17 business plan, named as customers jets managed by Jet Edge. (SUF No. 29.)
- 18 • Attached to Rodney Webb's February 18, 2016 e-mail were detailed  
19 financial projections about these same airplanes currently under Jet Edge  
20 management. (SUF Nos. 25 & 28.)
- 21 • On January 18, 2016 Rodney Webb e-mailed Schembari with notes from a  
22 January 13, 2016 meeting. (SUF No. 15.) These notes show that Schembari  
23 had confirmation that the Jet Edge Customers would leave Jet Edge for his  
24 new company Phenix Jet. Bullet point six of the notes states: "Phenix will  
25 enter into a business relationship with the Sojitz company based in Japan.  
26 The new business will manage 6 jets on behalf of Sojitz." (Id.) At her  
27 deposition, Elsie Quenga confirmed that those six jets were "*under Jet Edge*  
28 *management . . . at the time.*" (Id.)

- 1 • A March 10, 2018 e-mail in which Schembari told Bob Seidel, from whom  
2 Schembari eventually acquired the AOC, that “[o]ur aircraft are currently  
3 under management at another aircraft management company and require 90  
4 days notification for termination of the management contracts.” (SUF No.  
5 37.)
- 6 • On February 16, 2016, a month before resigning, Schembari entered into a  
7 broker agreement on behalf of his wholly owned company CDF wherein he  
8 provided services for Sojitz subsidiary TSI including to “[id]entify AOC  
9 holding companies, research the suitability of the AOC being held by  
10 identified companies, contact authorized representatives of AOC holdings  
11 companies ....” (SUF Nos. 30, 32.) CDF was paid \$300,000. (SUF No. 39.)
- 12 • Schembari, with Sojitz’s help, made sure that Jet Edge did not manage a jet  
13 with the tail number N2020, and instead that jet ended up under Phenix Jet’s  
14 management (SUF Nos. 41 & 44.)

15 Schembari performed all of these competitive acts (and more) while still employed  
16 by Jet Edge in violation of Section 3(b) of his employment contract.

17 Furthermore, Schembari and Sojitz created Phenix Jet to compete with Jet  
18 Edge. During and after Schembari’s employment with Jet Edge, Phenix Jet directly  
19 competed with Jet Edge. For example, the business plan discussed above named  
20 Jet Edge as Phenix Jet’s competitor. (SUF No. 22.) Also, Schembari admitted that  
21 Phenix Jet was “either a similar operator or a regional competitor to Phenix Jet.”  
22 (SUF No. 18.) Elsie Quenga testified that she considered Jet Edge to be Phenix  
23 Jet’s competitor in the charter business. (SUF No. 19.)

24 The most obvious evidence that Phenix Jet was set up to, and did compete  
25 with Jet Edge, is the fact that all of the Jet Edge Customers cancelled their ACMAs  
26 with Jet Edge and entered into ACMAs with Phenix Jet. (SUF Nos. 82–91.) Thus,  
27 Schembari breached Sections 3(a) and 3(b) of his Jet Edge employment agreement.  
28



1                   **ii.       Schembari Breached Section 6.2: “Restrictions” on**  
 2                   **Confidential Information.**

3           Section 6.1 of Schembari’s employment agreement defines “Confidential  
 4 Information” to include “client contracts,” “forms, policies and procedures,” “legal  
 5 documents,” and “training materials.” (SUF No. 45.) Restrictions on the use of  
 6 confidential information does not violate California law. “[T]he ‘right of free  
 7 competition does not include the right to use confidential work product of others.’”  
 8 *Luck v. OTX Acquisition Corp.*, 2010 WL 11595817 at \*12 (C.D. Cal. Aug. 3, 2010)  
 9 (citation omitted) (holding that allegations that the Luck used confidential  
 10 information to solicit business from OTX is sufficient to state a claim for unfair  
 11 competition). *See also Fowler v. Varian Assocs., Inc.* 196 Cal.App.3d 34, 44 (1987)  
 12 (“agreements designed to protect an employer’s proprietary information do not  
 13 violate section 16600”).

14           Section 6.2 states that both during and after an employee’s employment with  
 15 Jet Edge, the employee is “not to acquire, disclose, or utilize any Confidential  
 16 Information for purposes other than those purposes approved by Company during  
 17 the course and scope of Employee’s employment with Company.” (SUF No. 46.)  
 18 Schembari breached Section 6.2 in several ways, including, but not limited to:

- 19       •     Schembari took Jet Edge’s Employee Handbook and utilized it for his  
 20           company. (SUF No. 50.) The employee handbook for Phenix Jet is nearly  
 21           identical to Jet Edge’s. (SUF Nos. 50-51.) Schembari even forgot to remove  
 22           Jet Edge’s name from the Phenix Jet handbook under the Employee Property  
 23           section on page 45 which states “possession of Jet Edge property . . . .” (SUF  
 24           No. 51.) Jet Edge’s employee handbook is both a “form, policy, and  
 25           procedure” and a “legal document.” (SUF Nos. 52-53.) Thus, Schembari’s  
 26           use of Jet Edge’s employee handbook to develop Phenix Jet’s handbook  
 27           violated Section 6.2.  
 28



- 1 • Schembari used his employment contract with Jet Edge to create virtually  
2 identical employment contracts for Phenix Jet's employees. (SUF No. 56.)  
3 The similarities between Schembari's employment contract with Jet Edge  
4 and the contracts employees of Phenix Jet signed are unmistakable, including  
5 that the Phenix Jet employment contracts contain the very non-compete  
6 clause Defendants claim is invalid. (SUF Nos 54-55.) Jet Edge's  
7 employment contracts are "legal documents." (SUF No. 58.) Thus,  
8 Schembari's use of Jet Edge's employment contracts to develop Phenix Jet's  
9 contracts violated Section 6.2.
- 10 • The ACMAs that Phenix Jet entered into with the Jet Edge Customers mirror  
11 the ACMAs that Jet Edge entered into with these customers, including the  
12 format and language. In fact, Elsie Quenga told Yohei Sakurai that the  
13 Phenix Jet "AMA mirrors Jet Edge." (SUF No. 61.) Also, at Schembari's  
14 30(b)(6) deposition, he admitted that "Phenix Jet used Jet Edge's AMA as a  
15 form document." (SUF No. 59.) Jet Edge's ACMAs are "client contracts."  
16 (SUF No. 63.) Thus, Schembari's use of Jet Edge's ACMAs to develop  
17 Phenix Jet's ACMAs violated Section 6.2.
- 18 • Mattias Rosen sent Schembari, presumably at Schembari's request, Jet Edge  
19 information for Schembari to use at his new company. (SUF No. 64.)  
20 Mattias Rosen sent Schembari documents related to Jet Edge's Initial  
21 Operation Experience Completion, which relate to Jet Edge's training of  
22 pilots. (Id.) Schembari then rebranded these materials under the Phenix Jet  
23 name showing that he had no problem copying Jet Edge confidential material  
24 to save Phenix Jet money in generating its own documents. (SUF Nos. 65-  
25 66.) Jet Edge's Initial Operation Experience documents are "training  
26 materials." (SUF No. 68.) Thus, Schembari's use of these documents  
27 violated Section 6.2.
- 28 Schembari breached Section 6.2 in at least the above four ways.

1                   **iii.       Schembari Breached Section 6.4: “Return of Property and**  
 2                   **Confidential Information.”**

3           Section 6.4 states that “[f]ollowing termination or a request to return  
 4 Confidential Information, Employee will not acquire, use, maintain, copy, or  
 5 disclose any materials containing Confidential Information.” (SUF No. 69.) At  
 6 deposition, Schembari admitted that he retained his employment agreement and his  
 7 employee handbook after he resigned from Jet Edge. (SUF No. 47.) Furthermore,  
 8 as discussed in Section C(ii), Schembari acquired, used, and copied Jet Edge  
 9 Confidential Information including, but not limited to, Jet Edge’s employee  
 10 handbook, employment contracts, ACMAs, and Initial Operation Experience  
 11 documents. Schembari used and copied these materials after his employment with  
 12 Jet Edge ended to help Phenix Jet save resources. Thus, Schembari breached  
 13 Section 6.4 of his employment agreement.

14                   **iv.       Schembari Breached Section 7.3: “Non-disparagement.”**

15           Section 7.3 of Schembari’s contract states:

16           “Both during and after Employee’s employment with Company,  
 17 Employee will not make any representation of statement, whether  
 18 written or oral, to any person or entity, including, but not limited to,  
 19 former, current and potential clients, vendors, business partners,  
 20 employees, or competitors of Company or any of Company’s affiliates,  
 21 which reflects any opinion, judgment, observation or representation  
 22 that may defame, disparage, harm, or otherwise reflect negatively on  
 Company or its officers, directors or employees.” (SUF No. 70.)

23           A non-disparagement clause such as Section 7.3 is enforceable.  
 24 “[N]on-disparagement clauses appear to have become fairly common, both to protect  
 25 employers and employees when an employment relationship ends. . . . Certainly,  
 26 we discern nothing inherently unlawful about a party generally agreeing not to  
 27 disparage another.” *Edwards v. Arthur Andersen LLP*, 142 Cal.App.4th 603, 811  
 28 (2006). *See also Bakst v. Cmty. Mem’l Health Sys., Inc.*, 2011 WL 13214315, at

\*40 (C.D. Cal. Mar. 7, 2011) (“CMH cannot argue that it had a free speech right to disparage Bakst in the face of a valid non-disparagement provision in the Settlement Agreement”). As to the foregoing section, Schembari made at least two disparaging remarks regarding Jet Edge to Jet Edge’s clients and business partners. (SUF Nos. 71-72.) Schembari told Hideto Shimooka, who was the contact for Jet Edge customer Private Wings, as well as Sojitz representative, Yohei Sakurai, that “working with JEI [Jet Edge] ops *is continually challenging* due to time zone differences and their workload with US domestic fleet. If this is the case you will become *frustrated* in only a short time.” (SUF No. 71.) The next day, Schembari told these same two people that “[f]lights dispatched by JEI [Jet Edge] *never go smoothly* as there are always mistakes, oversights, and lack of communication.” (SUF No. 72.) Schembari knew he was acting improperly as he told the recipients “[p]lease keep my comments between us, as I don’t want David to feel like I am undermining him.” (Id.)

Hideto Shimooka was the agent for one of Jet Edge’s customers, Pocket Corporation. (SUF No. 74.) Schembari’s statements are clearly an opinion that disparaged Jet Edge and reflected negatively on Jet Edge. Schembari also made these disparaging statements to Yoehi Sakurai of Sojitz. (SUF Nos. 71-72.) Therefore, Schembari breached Section 7.3 of his employment agreement.

**v. Schembari Breached Section 7.4: “Prohibition on Planning.”**

Section 7.4 states:

“During Employee’s employment with Company, Employee will not, either alone or in combination with other employees or agents of the Company, plan or organize any business, entity, organization, or activity competitive with the Company.” (SUF No. 137.)

The Court already ruled in its October 10, 2017 order that Section 7.4 is valid. (See pages 13-14 of Dkt. No. 89.) Case law supports the Court’s order. “[A]n

1 employee, while employed, owes undivided loyalty to his employer.” *Huong Que,*  
 2 *Inc. v. Luu*, 150 Cal. App. 4th 400, 414 (2007). All of the acts that Schembari took,  
 3 as described in Section C(i), discussed above, are acts he took to compete against  
 4 Jet Edge. Therefore, these acts constitute a plan to compete with Jet Edge. Not  
 5 surprisingly, at his 30(b)(6) deposition, Schembari admitted that he planned to set  
 6 up Phenix Jet to compete with Jet Edge while still employed by Jet Edge.

7 Q. Okay. But you did, in fact, plan, while being employed with Jet Edge,  
 8 setting up Phenix jet, correct?

9 A. I did plan to set up Phenix Jet International. (SUF No. 14.)

10 Later Schembari testified:

11 A. Okay. And while at Jet Edge, you did plan to have a competitive  
 12 business with Jet Edge, correct?

13 Q. And I would say that I prepared to compete.

14 A. Okay. Same as planning, right?

15 Q. I don’t know if there’s a legal difference between the two, but I would  
 16 say I prepared to plan – or I prepared to compete. (SUF No. 13.)

17 Putting aside Schembari’s semantics, it is clear that Schembari started his  
 18 plan to develop a competing company with Sojitz at least as far back as November  
 19 2015. (SUF No. 11.) At Schembari’s April 25, 2018 deposition, he testified that  
 20 he had a meeting with Sojitz representatives in November 2015 during which he  
 21 opted to work with Sojitz to create a new company. (SUF No. 12.) In fact,  
 22 Schembari testified that by the end of November 2015, he had already come up with  
 23 the name Phenix Jet for his competing business that would eventually steal the Jet  
 24 Edge Customers. (Id.)

25 Schembari’s interrogatory responses also show that he planned to compete  
 26 with Jet Edge months before resigning from Jet Edge.

27 Interrogatory No. 2 – “Identify the date You first started planning to form a  
 28 company to compete with Jet Edge.

1 Response to Interrogatory No. 2 – He “started planning to form a start-up  
2 aviation management services company in or around December 2015.”  
3 (SUF No. 16.)

4 Schembari also admitted in response to Requests for Admission Numbers 27,  
5 28 and 30 that “during his employment with Jet Edge, Schembari communicated  
6 with Sojitz on a future business endeavor that would ultimately involve ACP in  
7 some manner.” (SUF No. 17.)

8 Finally, Schembari admitted that his actions were inconsistent with the  
9 language of Section 7.4 of his employment agreement:

10 Q. Your actions of planning Phenix Jet while you were employed b Jet  
11 Edge, and organizing Phenix Jet while were at Jet Edge, would you agree  
12 that that is not consistent with the language of 7.4?

13 A. I don’t know, but I don’t believe that it is.

14 Q. It is not consistent, correct?

15 A. Not consistent. (SUF No. 138.)

16 The undisputed facts show that Schembari planned to compete with Jet Edge  
17 while employed by Jet Edge (he actually competed as well), thus breaching Section  
18 7.4 of his contract. Any argument otherwise is without merit.

19 **D. Schembari’s Breaches Harmed Jet Edge.**

20 Each of Schembari’s several breaches of contract had a similar impact. Since  
21 Schembari, with Sojitz’s help, created a business designed to compete with Jet  
22 Edge, Schembari offered the Jet Edge Customers an alternative jet management  
23 company. Even worse, Schembari and Sojitz had pre-arranged that these Jet Edge  
24 Customers would leave Jet Edge for Phenix Jet before Schembari resigned from Jet  
25 Edge. Schembari not only took the Jet Edge Customers, but also its Confidential  
26 Information. As a result of Schembari’s breaches, the Jet Edge Customers  
27 terminated their relationships with Jet Edge and signed ACMAs with Phenix Jet.  
28 (SUF Nos 82-91.) Losing these customers has cost Jet Edge millions of dollars in

1 lost profits as set forth in the expert report of Jeff Kinrich. (SUF No. 92.) To its  
 2 benefit, Phenix Jet signed ACMAs with these former Jet Edge Customers, as well  
 3 as at least three other Sojitz jets (SUF No 93.)<sup>3</sup>

4 **V. The Court Should Dismiss Schembari's SACC.**

5 **A. Schembari Lacks Standing To Sue.**

6 Schembari is the only counterclaimant in this action. (SUF No. 99.) PJHK  
 7 is not a counterclaimant. (SUF No. 100.) However, the damages set forth in  
 8 Schembari's expert damages report are clearly damages suffered by PJHK.  
 9 Plaintiff's damages expert based her calculations of damages on the alleged lost  
 10 profits related to a three-year delay in the launch of operations of the AOC Charter  
 11 Services business of Phenix Jet Hong Kong, of which Schembari is an 18.75%  
 12 owner (SUF No. 101.)

13 Thus, Schembari tries to collect damages as a result of being a shareholder  
 14 of PJHK. (Id.) He does not have standing to do so. Specifically, in *Hilderman v.*  
 15 *Enea TekSci, Inc.*, 551 F.Supp.2d 1183, 1191-1192 (S.D. Cal. 2008), plaintiff  
 16 Hilderman formed the company HighRely. HighRely had a contract with Boeing  
 17 and a potential contract with Hospira. When HighRely lost the Boeing and Hospira  
 18 accounts, both HighRely and Hilderman sued Enea, Hilderman's former employer,  
 19 for intentional interference with contractual relations and prospective economic  
 20 advantage. *Ibid.* Plaintiffs based the lawsuit on an allegation that Enea interfered  
 21 with HighRely's economic relationships by telling them that Hilderman was  
 22 violating his Severance Agreement with Enea and "was subject to a non-compete  
 23 agreement." *Ibid.*

24 The court granted Enea summary judgment against Hilderman on both  
 25 interference claims. *Id.* at 1197. The court found that the intentional interference  
 26 "claim belong[ed] to HighRely only." *Ibid.* The court held that "Hilderman lacks  
 27

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28 <sup>3</sup> An additional damage is that Jet Edge paid Schembari his full salary although Schembari  
 was not working exclusively for Jet Edge. (SUF No 4).

standing to pursue the IPEA claim, which is based on a potential contract between HighRely and Hospira.” *Ibid.* (citing *Sutter v. General Petroleum Corp.*, 28 Cal.2d 525, 530 (1946) (reasoning that a stockholder cannot maintain an action on his own behalf for a wrong done by a third person to the corporation on the theory that such wrong devalued his stock)). Thus, the individual shareholder, Hilderman, could not maintain a lawsuit. Only the company that suffered alleged damages could do so.

Based on *Hilderman* and *Sutter*, Schembari cannot maintain an action as an individual where the company PJHK suffered the alleged harm. Schembari’s damages expert concludes it is ***PJHK that allegedly lost money*** due to Jet Edge’s supposed conduct. (SUF No. 101.) Indeed, it was not even Schembari’s relationships that he claims were allegedly interfered with – they were Andrew Svoboda’s. (SUF Nos. 102-103.) The case law holds that Schembari has no standing to bring a lawsuit as merely an 18.75% shareholder of PJHK. Instead, PJHK would need to bring any such lawsuit. For this reason, the Court should grant summary judgment and dismiss Schembari’s SACC in its entirety.

**B. Schembari’s SACC Is Barred by the *Noerr-Pennington* Doctrine and California’s Litigation Privilege.**

Schembari’s damages expert’s report makes another thing clear -- Schembari claims Jet Edge’s lawsuit caused PJHK’s damages. Plaintiff’s damages expert claimed the reason for the three-year delay and one-year cooling off period in the launch of operations of the AOC Charter Services business of PJHK was based on this lawsuit, including the fact it is set for trial in January 2019. (SUF Nos. 101 & 104.) Therefore, Schembari’s – or more accurately PJHK’s – alleged damages are the three years PJHK believes it missed out on profits due to Jet Edge’s lawsuit. Schembari confirmed the fact that Jet Edge’s lawsuit is the basis for his SACC at deposition.

Q. Okay, Now, you said this complaint disrupted your business.

A. Uh-huh, agreed. (SUF No. 105.)



1 Schembari cannot recover damages based on Jet Edge’s lawsuit due to the  
 2 *Noerr-Pennington* doctrine and the California litigation privilege. Both doctrines  
 3 apply to the current case. “[T]he *Noerr-Pennington* doctrine applies to . . . state  
 4 law tortious interference with prospective economic advantage claims.” *Theme*  
 5 *Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008).  
 6 “There is no reason that *Noerr-Pennington* and California privilege law cannot both  
 7 apply to . . . intentional interference claims, and we hold that the district court  
 8 properly considered both doctrines.” *Id.* at 1007 (emphasis added).

9 Both doctrines protect a person or entity’s First Amendment right to petition.  
 10 “Under the *Noerr-Pennington* rule of statutory construction, we must construe  
 11 federal statutes so as to avoid burdening conduct that implicates the protections  
 12 afforded by the Petition Clause unless the statute clearly provides otherwise.” *Sosa*  
 13 *v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (affirming dismissal of lawsuit  
 14 alleging RICO violations based on pre-suit demand letters). *See also Theme*  
 15 *Promotions, Inc.*, 546 F.3d at 1007 (affirming district court’s order setting aside  
 16 jury verdict on interference claim based on pre-suit letters pursuant to the *Noerr-*  
 17 *Pennington* doctrine); *UMG Recordings, Inc. v. Glob. Eagle Entm’t, Inc.*, 117 F.  
 18 Supp. 3d 1092, 1114 (C.D. Cal. 2015) (granting motion to dismiss  
 19 counterclaimants’ interference claims based on a pre-suit cease-and-desist letter).

20 Similarly, the litigation privilege provides that any “publication” or  
 21 “broadcast” made in any “judicial proceeding” is privileged. *See* Cal. Civ. Code  
 22 Section 47(b). “The usual formulation is that the privilege applies to any  
 23 communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants  
 24 or other participants authorized by law; (3) to achieve the objects of the litigation;  
 25 and (4) that ha[s] some connection or logical relation to the action.” *Silberg v.*  
 26 *Anderson*, 50 Cal. 3d 205, 211–12 (1990). Therefore, a plaintiff may not maintain  
 27 a lawsuit based on the litigation activity, such as the filing of a complaint. *See e.g.,*  
 28 *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1137 (1990)



1 (affirming demurrer of claims for intentional interference with contractual relations  
2 and prospective economic advantage where plaintiff could not allege that defendant  
3 had caused damages other than forcing it to defend a costly lawsuit).

4 As set forth above, there is not dispute that Schembari's SACC is based on  
5 Jet Edge's decision to bring a lawsuit against him. Therefore, the Court should  
6 grant summary judgment and dismiss Schembari's SACC in its entirety.

7 **C. Schembari's Last Minute Switch In His Theory Of Damages Bars**  
8 **Any Recovery.**

9 Throughout this litigation, including in his SACC, Schembari claimed his  
10 damages were based on the loss of his relationships with the Jet Edge Customers  
11 and Sojitz. (e.g., SUF No. 106.) In neither his initial disclosures nor his  
12 interrogatory responses did Schembari mention that he had a different damages  
13 theory. (SUF Nos. 108-113.) While Schembari testified vaguely about PHJK in  
14 his May 14, 2018 deposition, Jet Edge did not know Schembari would claim  
15 damages based on his interest in PJHK, and interference with Andrew Svoboda's  
16 claimed relationships, until Schembari's damages expert's report. (SUF Nos. 114-  
17 117.) By the time Jet Edge learned of Schembari's monumental shift, discovery  
18 had closed, leaving Jet Edge with no time to undermine his new theory in discovery.  
19 The Federal Rules of Civil Procedure prevent this type of litigation by surprise.

20 Under the Federal Rules of Civil procedure Rule 37(c)(1), "[i]f a party fails  
21 to provide information or identify a witness as required by Rule 26(a) or (e), the  
22 party is not allowed to use that information or witness to supply evidence on a  
23 motion, at a hearing, or at a trial, unless the failure was substantially justified or is  
24 harmless." Schembari failed to update his initial disclosures and his discovery  
25 responses to inform Jet Edge of his new theory. (SUF Nos. 109, 113.) Therefore,  
26 Schembari cannot raise new evidence to support his claim "at a hearing, or at trial."

27 In *Sutrisno v. WebMD Practice Services, Inc.*, 2005 WL 8154571 (C.D. Cal.  
28 June 30, 2005), the court granted summary judgment for defendant in an action for

1 interference with business relationships because plaintiffs had not disclosed their  
 2 damages theory in their interrogatory responses or initial disclosures. 2005 WL  
 3 8154571 at \*10. Plaintiffs attempted to raise a new damages theory that they had  
 4 spent hundreds of hours of uncompensated time trying to undo the alleged damage  
 5 caused by defendant's interference. *Id.* at \*6. The court did not permit plaintiffs to  
 6 advance this new undisclosed damages theory.

7 “Because they did not include the information in their initial  
 8 disclosures, omitted it from their interrogatory responses, and failed to  
 9 serve a supplement to their disclosures until virtually the end of an  
 10 already extended discovery period, plaintiffs failed to disclose the  
 information “seasonably” or at an “appropriate interval” during  
 discovery.” *Id.* at \*8.

11 *See also Fresno Rock Taco, LLC v. Nat'l Sur. Corp.*, 2013 WL 3803911, at \*10  
 12 (E.D. Cal. July 19, 2013) (barring introduction of evidence to support an award  
 13 because plaintiffs failed to identify the evidence during the course of discovery).

14 Schembari's actions in this case are worse than in *Sutrisno*. In that case, the  
 15 plaintiffs did supplement their disclosures, but belatedly. Here, Schembari has  
 16 never attempted to supplement his initial disclosures or interrogatory responses to  
 17 include the required information that Schembari's damages stemmed from the  
 18 alleged lost profits of PJHK. Schembari's discovery responses never mentioned  
 19 PJHK or its claimed potential clients such as Sino Jet and Metrojet, despite Jet Edge  
 20 requesting this information in discovery. (SUF Nos. 108-113.)

21 Since Schembari has embarked on a new damages' theory, he cannot return  
 22 to his previous damages' theory based on the loss of relationships with the Jet Edge  
 23 Customers and Sojitz. That ship sailed when Schembari's damages expert's report  
 24 contained no mention of this previously alleged damage. Thus, the court should  
 25 grant summary judgment and dismiss the SACC in its entirety.

26 **D. The Undisputed Facts Show That Jet Edge's Alleged Action Has**  
 27 **Not Caused PJHK Or Schembari Any Harm.**

28 The fifth element of a claim for intentional interference requires “economic

1 harm to the plaintiff proximately caused by the acts of the defendant.” *Westside*  
 2 *Center Associates v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 521-522 (1996).  
 3 Schembari has no evidence regarding PJHK’s claimed relationships with the  
 4 potential customers asserted in Schembari’s damages expert’s report. Schembari  
 5 also has no evidence these customers failed to enter into relations with PJHK based  
 6 on any action by Jet Edge.

7 For the same reason, Schembari’s claim under the UCL fails because a UCL  
 8 claim requires a causal nexus between a defendant’s act and a plaintiff’s harm. “In  
 9 order to pursue a UCL claim, the plaintiff must show that the practices that it  
 10 characterizes as unlawful *causes it to suffer an actual economic injury*.” *Demeter*  
 11 *v. Taxi Computer Servs., Inc.*, 21 Cal. App. 5th 903, 915 (2018) (affirming summary  
 12 judgment on UCL claim where plaintiff musician could not establish causation)  
 13 (emphasis added) (quotation omitted). *See also Two Jinn, Inc. v. Gov’t Payment*  
 14 *Serv., Inc.*, 233 Cal. App. 4th 1321, 1332 (2015) (“When a UCL action is based on  
 15 an unlawful business practice, there must be a causal connection between the harm  
 16 suffered and the unlawful business activity.” (quotation omitted).

17 The undisputed facts show that Schembari cannot show causation and the  
 18 Court should grant summary judgment and dismiss Schembari’s SACC.

19 **E. Schembari Cannot Maintain His Interference Claims Because the**  
 20 **Undisputed Facts Show That Jet Edge Did Not Have Knowledge**  
 21 **of PJHK’s Claimed Prospective Economic Relationships.**

22 The undisputed facts show that Schembari has no evidence to support several  
 23 of the elements necessary to establish a claim for intentional interference with  
 24 prospective economic advantage. These elements are “(1) an economic relationship  
 25 between the plaintiff and some third party, with the probability of future economic  
 26 benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3)  
 27 intentional acts on the part of the defendant designed to disrupt the relationship; (4)  
 28 actual disruption of the relationship; and (5) economic harm to the plaintiff

proximately caused by the acts of the defendant.” *Westside Center Associates*, 42 Cal. App. 4th 507, 521-522 (1996) (citation omitted). The tort of negligent interference with prospective business advantage has many of the same elements as an intentional interference with prospective business advantage claim. *UMG Recording, Inc. v. Global Eagle Entertainment, Inc.* 117 F. Supp. 3d 1092, 118 (C.D. Cal. 2015). Schembari’s lack of evidence to support the elements of his intentional interference claim is also fatal to his negligent interference claim.

Here, first and foremost, Schembari has no evidence to establish element number two -- that Jet Edge knew of PJHK’s relationship with its claimed potential customers. Prior to June 2018, Jet Edge, including Bill Papariella, Ed Frank and David Erich, had never heard of PJHK. (SUF Nos. 119-121.) Naturally, Jet Edge had no idea that PJHK purportedly had potential economic relationships with Sino Jet, Metro Jet, HK Bellawings, or Hongkong Jet. (SUF Nos. 122-124.) Therefore, the undisputed facts show that Jet Edge did not know of PJHK’s claimed prospective relationships, the Court should grant summary judgment with respect to Schembari’s interference claims.<sup>4</sup>

**F. The Undisputed Facts Show That Jet Edge Did Not Commit an Independently Wrongful Act.**

“[A] plaintiff seeking to recover for interference with prospective economic advantage must also plead and prove that the defendant engaged in an independently wrongful act in disrupting the relationship.” *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152 (2004). An act is not “independently wrongful merely because defendant acted with an improper motive . . . . [A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law or other determinable legal standard.” *Korea Supply Co.*

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<sup>4</sup> Since Jet Edge did not know about PJHK’s claimed economic relationships, Schembari also cannot establish the third element that Jet Edge acted intentionally to disrupt the relationships or in a manner it should have known would disrupt the relationships. Thus, Schembari fails to establish this necessary element.

1 *v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158–59. *See also* CACI 2202,  
2 element 3; and CACI 2204, element 4.

3 Schembari’s damages expert’s report (and Schembari’s own testimony)  
4 clearly states that Schembari has sued Jet Edge due to Jet Edge’s lawsuit. (SUF  
5 Nos. 101 & 104-105.) This is not a wrongful act, and thus, there is no  
6 “independent” wrongful act that Schembari can point to. Accordingly, Schembari  
7 cannot show that Jet Edge engaged in an independently wrongful act.

8 **G. Schembari Cannot Show That Jet Edge Engaged in Unlawful,**  
9 **Unfair, or Fraudulent Conduct.**

10 To maintain a UCL claim, “a plaintiff must show either an (1) unlawful,  
11 unfair, or fraudulent business act or practice, or (2) unfair, deceptive untrue or  
12 misleading advertising.” *Moss v. Infinity Ins. Co.*, 197 F. Supp. 3d 1191, 1198  
13 (N.D. Cal. 2016) (quotation omitted). Schembari alleged that Jet Edge engaged in  
14 unlawful conduct by including a non-compete clause in Schembari’s contract.  
15 Schembari’s damages expert’s report and his deposition testimony show that  
16 Schembari has abandoned this theory and claims that his injury is due to Jet Edge’s  
17 lawsuit. Since Jet Edge’s filing of a lawsuit is protected by California’s litigation  
18 privilege, that activity cannot form the basis of a UCL claim. *See e.g. Banga v.*  
19 *Equifax Info. Servs. LLC*, 2016 WL 741963, at \*4 (N.D. Cal. Feb. 25, 2016)  
20 (granting summary judgment on UCL claim based on defendant’s public filing of a  
21 lawsuit, which was conduct protected by California’s litigation privilege).

22 In *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993) (en banc), the California  
23 Supreme Court affirmed the dismissal of plaintiff’s UCL claim based on the  
24 defendant law firm’s solicitation of park residents to litigate against the park owner  
25 over a mobile home park’s condition. The California Supreme Court determined  
26 that the law firm’s conduct was protected by California’s litigation privilege, and  
27 thus, the UCL claim could not stand. *Id.* at 1199–1200. Since the filing of a lawsuit  
28 cannot serve as the basis for a UCL claim, Schembari has no ability to prove that

1 Jet Edge engaged in unlawful, unfair, or fraudulent conduct. Therefore, Jet Edge is  
2 entitled to summary judgment on Schembari's UCL claim.

3 **VI. CONCLUSION**

4 For the foregoing reasons, Plaintiff respectfully requests that the Court grant  
5 Plaintiff's motion for partial summary judgment finding that Schembari breached  
6 his contract with Plaintiff as set forth above, as well as finding that all of  
7 Schembari's causes of action should be dismissed as matter of law.

8  
9 Dated: August 6, 2018

**MICHELMAN & ROBINSON, LLP**

10  
11 By: /s/ Robert Estrin  
12 Sanford L. Michelman  
13 Todd H. Stitt  
14 Robert D. Estrin  
15 *Attorneys for*  
16 *WESTERN AIR CHARTER, INC.*  
17 *dba JET EDGE INTERNATIONAL*  
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